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JOHN MARSHALL ON CONTRACTS. A STUDY IN EARLY AMERICAN JURISTIC THEORY.

THE recent biographers and critics of the great judge who "vitalized the Constitution" of the United States have naturally emphasized those features of his work which the perspective of a hundred years throws into prominence.[1] They see in such decisions as Marbury *v.* Madison, M'Culloch *v.* Maryland, Gibbons *v.* Ogden, and the Dartmouth College Case [2] great state papers, to be interpreted in the light of the political needs of his day. Senator Beveridge, in particular, goes into the historic facts preceding and surrounding each decision with a thoroughness that leaves little to be desired. But there is another background, besides the purely biographical and the political, against which it is interesting for the lawyer at least to watch the gigantic figure of John Marshall.

The contribution of every judge, in fact every great decision, from the lawyer's point of view, takes its place in the development of the common law. The fact that a decision deals with a statutory or constitutional provision makes no difference, for the enactment is itself but an incident in the chain of the history of the common law, its terms and concepts are conditioned by that history, and its eventual interpretation and application merely continue the development. One may ask, therefore, in

[1] ALBERT J. BEVERIDGE, LIFE OF JOHN MARSHALL (1919); EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1909). See also Robert E. Cushman, "Marshall and the Constitution", MINNESOTA LAW REVIEW, December, 1920.

[2] 4 Dall. 14; 4 Wheat. 316; 9 Wheat. 1; 4 Wheat. 518.

connection with the decisions of John Marshall, what was the state of the common law with which he was familiar; what was his attitude toward its general principles; what, in a word, was his articulate or inarticulate jurisprudence? Perhaps some light can be thrown on this question by referring to some of his decisions involving the theory of contracts.[3] To do this, we must give up for the moment our preconceived notions based on the very peculiar evolution of contract law in England and America during the Nineteenth Century, and try to restore, so far as possible, the concept conjured up by the word "contract" to the lawyer of Revolutionary days. In Mr. Jenks's introduction to the part of his Digest dealing with contracts, there is a very interesting passage in which it is suggested that the subject of contracts as a distinct part of the law is a development of the Nineteenth Century in England. Its portions are, of course, taken from what the Eighteenth Century dealt with under other heads—bailments, master and servant, landlord and tenant, conveyance, assumpsit, covenants under seal, the law merchant, and a hundred others. That there was no unifying principle apparent on the basis of which a general contract law could be predicated was due in part to the firm hold that formal pleading had on the substance of the law. Rights that had to be vindicated by

[3] Besides the famous cases involving the interpretation of the contracts clause (Fletcher *v.* Peck, 6 Cranch 87; New Jersey *v.* Wilson, 7 Cranch 164; Sturges *v.* Crowninshield, 4 Wheat. 117; and Ogden *v.* Saunders, 12 Wheat. 213) there were many minor cases involving phases of contract law, in which Marshall delivered opinions, *e. g.*, Levy *v.* Gadsby, 3 Cranch 179 (usury); McFerran *v.* Taylor, *ib.*, 270 (sale of land by description); Douglas *v.* M'Allister, *ib.*, 298 (damages for breach); Grant *v.* Naylor, 4 Cranch 224 (interpretation); U. S. *v.* Gurney, *ib.*, 333; Morgan *v.* Reintzel, 7 Cranch 273 (consideration in note); Hunt *v.* Rousmanier, 8 Wheat. 174 (agency); Etting *v.* Bank, 11 Wheat. 59; Armstrong *v.* Toler, 11 Wheat. 258; Tayloe *v.* Riggs, 1 Pet. 591; Cathcart *v.* Robinson, 5 Pet. 264; United States *v.* Robertson, 5 Pet. 641 (construction of a bond). An examination of these decisions does not reveal any marked divergence from the law of contracts that was rapidly being developed in the State courts of the day. It is only in the occasional case that takes us back to fundamentals that Marshall's peculiar philosophy of law in relation to contracts shows itself. For this, the most illuminating document is the dissenting opinion in Ogden *v.* Saunders, considered below.

widely different remedies did not appeal to the practical lawyer as related rights, and, as a matter of fact, they were not related. The treatment of contracts in Blackstone is significant.[4] To him the most appropriate place for the subject is under the general head of "conveyance". A contract is one of a dozen modes of producing an effect on the title of property. "A *contract executed* (which differs nothing from a grant) conveys a *chose in possession;* a *contract executory* conveys only a *chose in action.*" Contrast with this the classification of a century later, when Professor Theophilus Parsons opens his book on Contracts (1853) with these words:

> "The law of contracts in its widest extent may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts expressed or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfilment of contracts." [5]

"Contracts" has been elevated to the position of a main heading and "conveyance" has been relegated to that of a sub-head, an occasional incident in the performance of a contract. Between Blackstone and Parsons there is not so much a revolution in the law of the subject as a change in the jurisprudence of the lawyers. There is, to be sure, one change, if change it may be called, accomplished between the *dicta* of Mansfield and Wilmot in the case of Pillans *v.* Van Mierop (1765) [6] and the decision of the House of Lords in Rann *v.* Hughes (1778). [7] That case lays down the generalization that every contract not under seal must have a consideration in order to be binding. This generalization lays the foundation for a law of contracts to take the place of unrelated laws governing various types of acts and agreements. That case furnishes the very thing that has been lacking in the Nineteenth Century law of torts. In the absence of a fundamental generalization, it has often been remarked, we have

[4] 2 BL. COM. 440-470.
[5] 1 PARSONS, CONTRACTS, p. 3.
[6] 3 Burr. 1663.
[7] 7 Term Reports 350.

laws governing various types of torts, but no tort-law.[8] The attempted generalization of the last century, that there can be no liability without fault, has failed; and no satisfactory substitute has as yet been discovered. In the case of contracts, however, the generalization with reference to consideration soon made it possible to talk of all types of enforceable agreements as contracts. Accordingly, we find a treatise on the subject as early as 1790, Powell on Contracts. But the great treatises on contractual law still deal only with those special phases of the subject that had been named as distinct branches of the law in the previous century: Jones on Bailments (1781), Story on Bailments (1832), Story on Partnership (1841), Story on Bills of Exchange (1843), Story on Promissory Notes (1845). Kent's Commentaries make no great departure from the outline of the law that Blackstone had inherited from Hale, but the American commentator by means of his "and hereins" is able to expand contracts into a comprehensive heading. He speaks of "those great fundamental principles which govern the doctrine of contracts, and pervade them under all their modifications and variety".[9] Joseph Chitty's great work on Contracts appears in an American edition in 1834. The next decade produces Addison's book in England and a few years later Parsons' in America. It is interesting to note that while Parsons was writing, Sir Henry Maine was formulating the views expressed somewhat later in his Ancient Law (1861), that the progress of all civilization was "from status to contract".[10] This famous phrase soon became a most popular formula, not only among lawyers, but among political thinkers. It seemed to hold in itself the history of the emancipation of Western Europe from that mediæval feudalism in which every man's rights, duties, privileges, powers, and their opposites were determined by his position rather than by agreements voluntarily entered into. At

[8] Noticed by Markby in his ELEMENTS OF LAW (1871) p. 95, and since then repeated by most writers on Torts.

[9] KENT, COM., Part V (Of the Law Concerning Personal Property), Chapter xxxix, "Contracts".

[10] ANCIENT LAW, end of Chapter V. Limitations on the doctrine are discussed in "The Standardizing of Contracts", 27 YALE LAW JOURN. 34; 144 LAW TIMES 222, 243.

the same time, it seemed to herald a kind of freedom from state interference which was one of the ideals of the Nineteenth Century.

What, then, was the meaning of the expression "obligation of contracts" in John Marshall's day, and particularly in 1787 when the Constitution of the United States was drafted? So far as this question is to be answered in the light of the common law, this much is clear; the term is not nearly so *extensive* as the Nineteenth Century mind was thoughtlessly inclined to suppose. It is doubtful, for example, whether the existence or non-existence of a possessory lien would have been looked upon in those days as a question of contract.[11] It would rather have been one of remedy. And yet we know that a generation later the whole subject of lien law was stood on its head so as to make it appear that all liens were dependent upon contract, expressed or implied.[12] And the same is true of many other branches of the law. Furthermore, the definition of contract in 1787 would have been less *intensive* as well as less extensive. That is to say, one would have hesitated, even in view of the recent decision in the House of Lords, to declare a valuable consideration an absolute *sine qua non*. True, Blackstone had said that a consideration of some sort or other was absolutely necessary to the formation of a contract. Yet he adds: "If a man enters

[11] At first, the very existence of a lien depended on the absence of a "contract" and the consequent inability to sue. See Ames' discussion of Chapman *v.* Allen (1632), Cro. Car. 271, in LECTURES IN LEGAL HISTORY, p. 158.

[12] In 1794, Lord Kenyon said that liens were either by common law, usage, or agreement. Naylor *v.* Mangles, 1 Esp. 109. In 1805, in Rushforth *v.* Hadfield, 7 East 224, one of the judges said *arguendo*, "And it is admitted that the question . . . was properly left to the jury, . . . if the usage of the carriers . . . was so general as that they might conclude that the parties *contracted with the knowledge* and adoption of such usage." In other words, "usage" is no longer an independent, coordinate source of liens, but merely evidence useful in establishing the implied terms of a particular contract. It is only one more step to say (as is done, *e. g.*, in 25 CYC. 663) that liens can be created *only* by a contract, express or implied. For a discussion of the general bearing of this development on the history of the theory of contracts, see "The Standardizing of Contracts", *supra*, from which the substance of this note is reproduced.

into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration in order to evade payment; for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration." [13] If we carefully avoid reading into this what we understand to be the law today, it will be obvious how indefinite the law of consideration must have been in the minds of the American lawyers who had learned most of their law from Blackstone. In the first place, signing a written promise—negotiability or special form does not seem to be required—does away with the necessity of proving the existence of anything that we call consideration. But what is more interesting is the effect of this conclusive evidence of a "good"—not a "valuable"—consideration: "Courts of law will support [the note or bond] as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract". This is consistent with Blackstone's view expressed elsewhere, for example, in 2 COM. 444, that a good consideration is binding *inter partes,* but unless valuable also, may be set aside when it tends in its consequences to defraud third persons.

Let us now turn to another possible source of ideas on the subject of contract open to the lawyer of Revolutionary days. It has been suggested that the entire expression "obligation of contracts" is foreign to the common law, and that, therefore, the source of the idea is to be sought in those books of the Civil Law which, it is known, had found their way into the Colonies.[14] This suggestion, however attractive, has not been very successfully followed up. In fact, it hardly seems necessary, for the simple reason that even if the ideas of the colonists were somewhat colored by continental writings in which

[13] 2 BL. COM. 445, 446.

[14] Cf. WARREN, HISTORY OF THE AMERICAN BAR, *passim.* The usage of the terms obligation and contract still current in Civil Law countries is neatly illustrated in the following passage: "En droit romain . . . la convention n'est pas, en principe, génétrice d'obligations. . . . Pour qu'elle devienne obligatoire, il faudra qu'elle soit incorporée dans une solennité juridique ayant la vertu de la transformer en contrat, qu'elle prenne une forme légale qui la munisse d'action."

such expressions were used, it is by no means likely that they realized that there was any difference between the continental conception and the English. Thus the French idea of the rights of man and the English legal idea of the rights of Englishmen were put forward by them almost interchangeably. Jefferson, it is true, in his general disgust at lawyers and hatred of the common law, inclined more towards the sweeping phraseology of the cosmopolitan law-of-nature school, with its rights of man in the abstract. But what Burke tells us of the avidity with which the colonists devoured Blackstone and the astuteness with which they were ready to argue about their rights as Englishmen must be weighed in the balance. And until a clear line of distinction is discovered between those swayed by the one and those swayed by the other argument—a highly improbable condition—we may assume that the arguments were picked up indiscriminately, as they seemed to serve the purpose of men who were determined to resist what they considered tyranny. And so it must have been with the law in general. If any real conflict was perceived by any one in those days between the Roman concept of an obligation and the Anglo-American, more or less nebulous, concept of a contract, it is hardly likely that the men who drew the Constitution gave deliberate preference to the foreign one. At least, nothing was said of the subject in the reported debates. Marshall himself, after giving his own views of the nature of the obligation of contracts, which we shall presently examine, shows that he considers such foreign books as have come to his attention merely corroborative. "This reasoning", says he, "is undoubtedly much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present and of past ages." [15]

It has also been suggested that the word contract itself may have been used in the sense of a "transaction" rather than an agreement. This is the sense in which the word was used in the Year Books.[16] It is this sense of the term that Hale probably had in mind when he drew the outline of law that Black-

[15] In Ogden *v.* Saunders.

[16] "The word contract was used in the time of the Year Books in a

stone finally developed in his Commentaries. In this sense, a contract is a mode of conveyance. Thus a sale is a contract; a loan is a contract; a grant is a contract. There is no such thing as an executory contract in the modern sense, though there may be a debt growing out of the contract, the finished conveyance. If this is the sense in which the term is used, then, as Judge Johnson remarks, it is hard to imagine what is meant by the "obligation of contracts". It is worthy of consideration, however, that at least Fletcher *v.* Peck [17] and New Jersey *v.* Wilson [18] and possibly the Dartmouth College Case [19] could have been determined, as was Terrett *v.* Taylor,[20] on the theory of the vesting of property by a grant without reference to the contract clause. In the first of these it was said: "A grant is a contract within the meaning of this provision."

A third sense in which the expression "obligation of contract" may have been understood by some is based on that philosophy of law which sees in moral obligations a kind of legal obligation. That is to say, the obligation spoken of is primarily moral, but, in the mind of the user of the term, there is no clear distinction between the merely moral and the legal. Today. with our ready resort to the legislature for the purpose of making and changing law, and with much of our law consequently in the form of statute, we are all too ready to look upon positive law as one thing and that which ought to be law as quite a different thing, a mere argument to be addressed to the legislature.[21] Was this the general attitude in the Eighteenth Century? It surely was not on the continent of Europe, where Christian Wolff was in great vogue with his *Institutiones Juris*

much narrower sense than that of today. It was applied only to those transactions where the duty arose from the receipt of a *quid pro quo, c. g.* a sale or loan." AMES, LECTURES ON LEGAL HISTORY, p. 123, n. 3. Among the illustrations cited, note particularly Y. B., 41 Ed. III. 7, 15: "Thorpe, C. J., 'You say truly if he put forward an obligation of the debt, but if you count upon a contract without obligation, as here [a loan], it is a good plea.'"

[17] 6 Cranch. 87.
[18] 7 Cranch 164.
[19] 4 Wheat. 518.
[20] 9 Cranch 45.

[21] I attribute this change in popular juristic theory to the external state of the law as lawyers find it rather than to the influence of Austin. Cf. "The Schools of Jurisprudence", 31 HARV. LAW REV. 373, 380.

Naturae et Gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur (1754). The pretensions of this author, who called himself *Professor Generis Humani,* were the climax of a long movement in the direction of making reason a new guide of life, on the supposition that by introspection alone man could find the source of wisdom in himself.[22] That these pretensions were finally routed by Kant and his successors is well known to the students of the history of philosophy, and indeed of the history of all sciences; for the Nineteenth Century departed from the methods of the Eighteenth Century in nothing more than in its rejection of the deductive method of pretending to add to human knowledge by taking out of generalizations what men had no business to put into them in the first place. There is not much difference between the naturalist's solemnly pronouncing, *"Omnis vita ex ovo",* and then making special applications of the doctrine—and the jurist's declaring that the law of nature requires the fulfilment of contracts and deducing therefrom a law of contracts. But this was the method of the century in which our Constitution was written. Wolff was imitated and largely translated into French by Vattel, and he in turn helped to influence the thought of France and America. He was one of "those writers on natural and national law", to whom Marshall looked for corroboration. But independently of this strain of influence, the writers of the Eighteenth Century are full of the glorification of reason and of the natural rights to which reason is supposed to point the way.[23] Accordingly, it is not difficult to suppose that in the "obligation of contract" something is seen which transcends the law-making power of the state, something dictated by reason or by nature itself, something which the state can enforce, or, if it is iniquitous, impair, but something which the state does not create. In short, it is not the state that gives validity and force to the contract, but, conceivably, a contract that gives validity and force to the state. Exploded as this notion may seem to us, it is entirely in keeping with the philosophy of the Eighteenth Century, and in view of the indefinite-

[22] *Ib.,* 387-396.

[23] For a list, see *ib.,* pp. 390 ff.

ness of the common law theory of contracts at that time, and a certain receptivity to French ideas, it will explain John Marshall's somewhat mysterious utterances upon the subject of contracts. In his dissenting opinion—dissenting opinions are unfortunately overlooked by eulogists—in Ogden *v.* Saunders,[24] John Marshall, with a full appreciation of the contention of the other side, asserts the existence of an obligation of contracts independent of the work of the state:[25]

> "The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs, that he shall perform what he has undertaken to perform. That though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.
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> "It is an argument of no inconsiderable weight against it, that we find no trace of such an enactment. So far back as human research carries us, we find . . . . . no illusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their

[24] 12 Wheat. 213, 344. It is to be regretted that Mr. Beveridge passes over this opinion, which throws so much light on Marshall's philosophy of law, with the simple remark that it showed his conservatism. See Vol. IV, p. 481 of his work.

[25] This is manifestly inconsistent with the theory in Sturges *v.* Crowninshield, where Marshall says somewhat abruptly: "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking and this is, of course, the obligation of his contract." 4 Wheat. 117. To Mr. Beveridge these definitions seem so obvious that he suggests they are given "much as a weary school teacher might teach the simplest lesson to a particularly dull pupil". In the light of the passages from Marshall's more careful and more personal opinion quoted below, they seem rather grumbling concessions to the majority of the court whose opinion he is undertaking to formulate.

> source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, *although they may be controlled, are not given by human legislation.*"

The fact that Judge Story concurred in Marshall's dissent is not surprising when we consider the readiness with which Story accepted a belief in the exercise of general principles of justice and the power of the human mind to formulate propositions of natural law. But Marshall goes much further. Like most thinkers of the Eighteenth and early Nineteenth Centuries, he is quite willing to make not only his law, but also his history, *a priori,* out of that which the human mind figures out *must* have happened. Just as the opponents had assumed that there must have been an original statutory declaration, long lost, making contracts obligatory, Marshall, though rejecting this suggestion for lack of evidence, assumes with Rousseau and others that there must have been an "original compact" preceded by a state of nature.[26] The absence of evidence that finally made this whole theory of the antecedent state of nature crumble did not seem to occur to him. Perhaps he had not read Burke. He spoke of "tracing the right to contract, and the obligations created by contract, to their source". How does he undertake to do this? Precisely as any Eighteenth Century philosopher would write history, thoughtfully and with his eyes closed:

> "In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least, while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. [Has the jurist been reading Adam Smith?] Is this contract without obligation? If one of

[26] Webster, in arguing, had quoted THE FEDERALIST, No. 44, where Madison speaks of such laws as "contrary to the first principles of the social compact". Blackstone, it will be remembered, assumed both an original compact between King and people and a contract among the people themselves as the basis of law.

them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because, upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle, that the injured party may be the weakest. In society, the wrongdoer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory. . . . .

"In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement."

We come now to the social compact by which men emerge from the state of nature into and form a "society":

"What is the effect of society upon these rights? *When men unite together and form a government, do they surrender their right to contract,* as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be, that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that *obligation is not conferred on contracts by positive law, but is intrinsic,* and is conferred by the act of the parties. This results from the right

> which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it." [27] [Italics supplied.]

If the true art of interpretation consists in ascertaining the intention of the legislative draftsman it is submitted that Marshall was right and the majority wrong in the Ogden Case. His submission to the decision of the court has the tone of being of the same opinion still.[28] But Marshall belonged to that early group of glossators of the Constitution whose interpretation can be called contemporary. He knew, as his most recent biographers have made clear, the evils that the Constitution was intended to meet: in this particular instance, the short-sighted, if not dishonorable, schemes of State legislatures to favor their debtor citizens as against foreign creditors. He had the same outlook on life as the makers of the Constitution. But in addition we must not forget that he had the same philosophy of law. In the Ogden Case he is forced to dissent from colleagues who belong to the second generation of interpreters of the Constitution. Their work is still what I have frequently called glossation—the word-study which is the aftermath of any codification, even a codified Constitution [29]—but their definitions of words are informed by a new philosophy of law. Talk of an obligation of contracts independent of positive law is a jargon which they do not understand. It is not that they are averse to Marshall's idea about a State's inability to force a reservation of a power of impairment into contracts made under its laws—they have practically assented to that doctrine in the Sturges Case—but they cannot find the doctrine in the four corners of the Constitution as they understand its words.

In Ogden *v.* Saunders, Marshall uttered the warning or prediction that if the majority opinion prevailed, States would soon be nullifying an important clause of the Constitution by merely declaring that all contracts shall be made subject to the

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[27] Ogden *v.* Saunders, 12 Wheat. 213.

[28] See Boyle *v.* Zacharie (1832) 6 Pet. 648.

[29] Cf. "The Aftermath of Codification", 4 AM. LAW SCHOOL REV. 548; 1920 Proceedings of the American Bar Association.

existing laws of the State, and any modifications thereof that the State may see fit to make. This prophecy has not come true. On the contrary, the idea for which Marshall argued in the Ogden Case was later judicially developed in the United States on the basis of the Fourteenth Amendment, the notion of a consitutional right of liberty to contract. The firmness with which this docrine fastened itself upon American courts in the last years of the Nineteenth Century, in spite of the growing demand for legislation regulating and supplying terms for certain particular contracts, for a time discouraged efforts towards much needed social legislation.[30] It is only in the last decade that courts have come to realize that freedom of contract in the sense of a right to make whatsoever contract one sees fit, regardless of the interests of society, is neither a constitutional nor a common law right. But the point that is interesting here is that the ideas of the super-governmental nature of the obligation of a contract which Marshall acquired in the Eighteenth Century continued to grow in the popular mind throughout the following century, and that although Marshall was overruled in his attempt to find it in the Constitution, where it *was* written, a juristic tendency of a later day—a more liberal mode of interpretation having taken the place of the early glossators—succeeded in finding it in clauses where it had *not* been written.

Marshall, then, while in a sense anticipating a later development in our Constitutional Law, really inherited his notion of a contract as something above ordinary positive law from the Eighteenth Century. He was not concerned, as were the courts twenty years ago, with the ideal of individual liberty, but rather with the sanctity of contract; not with the right of the citizen, but with his duty. Here we have a key, quite independent of the political considerations of the day, to unlock Marshall's views that led to his holding the State of Georgia bound to its contract in the case of Fletcher *v.* Peck,[31] that explain his opinion in Sturges *v.* Crowninshield,[32] and even the Dartmouth College Case.[33]

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[30] Pound, "Liberty of Contract", 18 YALE LAW JOURN. 454 (1908).
[31] 6 Cranch 87.
[32] 4 Wheat. 117.
[33] 4 Wheat. 518.

The Dartmouth College Case, however, presents this departure from Eighteenth Century contract law: The law of contracts has already reached out into other parts of the digest to claim independent principles of law as its own. Not that it was difficult for the Eighteenth Century mind, which saw in the very organization of government a kind of contract, to conceive of the relation between the government and its citizens or its creatures as a contract—but what was new was the actual application of the omnivorous conception of contracts to the particular instance of incorporation. The conception of contract has in this case grown *extensively* rather than *intensively*. It is interesting that in this one connection the prophecy that Marshall uttered in the case of Ogden *v.* Saunders was in a measure fulfilled, for States thereafter, by the insertion of the "alter, amend or repeal clause" in charters and later in their statutes and Constitutions abrogated the constitutional principles which Marshall laid down in the Dartmouth College Case. The same result might have been accomplished had the law of contracts been permitted to grow intensively so as to form a clear definition which would itself have excluded acts of incorporation, just as appointment to office has been excluded from the realm of contract by definition.[34] As a matter of fact, the popular legal and political philosophies have been controlling factors in exempting the State from the law of contracts. What they could not exclude directly by definition, they indirectly forced out by legislation. What they did not see fit to exclude, they left within or brought into the effective definition of contracts for purposes connected with the anti-impairment clause.

The driving force which brought together fragments from every section of the law to make a uniform law of contract was thus the same as the force which eventually excluded certain other departments of law which might logically have been included in the field of contracts. The understanding of the general run of citizens, and particularly of business men, has formulated the current law of contracts. Feudal relations, domestic relations (such as master and servant), trust relations,

[34] Butler *v.* Pennsylvania, 10 How. 402; Crenshaw *v.* United States, 134 U. S. 99; Taylor *v.* Beckman, 178 U. S. 548.

have been converted at the magic touch of business into contractual relations. At the same time certain other relations, notably those between the State and its citizens, between public utilities and their patrons, and between employer and employee are being gradually, but definitely withdrawn from the control of the pure contractual principle of assent.[35] The pendulum, in other words, is swinging back from that juristic conception which would have reduced all law to the principle of voluntary agreement.

That Marshall shared the jurisprudence and the philosophy of his day does not in any measure detract from his greatness. That he was conservative and not responsive in the same measure as his colleagues to the popular demands of the hour, such as that which caused the decision in Ogden *v.* Saunders, may be interpreted either in his favor or against him—that depends upon one's point of view. But this much seems proved,—that in estimating the work of a great judge or a small one, it is not enough to study his personal biography and the political facts of his day, important as these considerations are. We must also go into the juristic notions of the time, the "popular jurisprudence" which, consciously or unconsciously, for better or for worse, exerts its subtle influence, even through the most practical of men, on the development of the law.

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[35] Cf. "The Standardizing of Contracts", *supra.*